112-76

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

THE UNITED STATES
vs.
WADDELL, &c.
No. 875.

MOTION TO ADVANCE,

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MOTION TO ADVANCE.

This record presents a question which arose below upon a demurrer to an *information*, and is certified to this court upon a division, &c.

The information charges that the defendants conspired to intimidate, &c., one Lindsay in the exercise of the privilege of protecting his claim to a homestead upon lands of the United States, *by residence thereupon*—his right to a patent therefor by such residence not yet having matured—under section 2291, Revised Statutes.

The particular question certified is, whether during the period that a settler is required by the laws of the United States to reside upon land in order to perfect his title, he is in enjoyment of a right *guarantied to him by those laws*, so that a conspiracy to deprive him thereof is a crime under the Constitution and Statute.

The case *below* is reported XVI Federal Reporter, 221.

Inasmuch as the petition for a *habeas corpus* by Yarbrough and others involves the same general question it may be convenient to the court, as it seems to be otherwise proper, to pass at the same time upon this case also.

S. F. PHILLIPS,
Solicitor-General.

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In the Supreme Court of the United States.

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BRIEF FOR THE UNITED STATES.

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BRIEF FOR THE UNITED STATES.

This is an information for conspiracy, &c., to hinder one Lindsey in the enjoyment of his right as a citizen to make a homestead entry, and to perfect his right to a patent therefor *by residence*. The defendants demurred; and upon that the judges below differed, and sent the case up upon their certificate, &c.

The information contains three counts:

1. That Lindsey, a citizen of the United States, on the 30th of December, 1882, at the land office in Little Rock, Ark., made homestead entry of a tract of land in Van Buren County, described as follows, &c., and thereafter was residing upon it in order to perfect his right to the same, his right to a patent not having yet accrued. And that Waddell, &c., on the 10th day of January, 1883, &c., did conspire to intimidate, &c., the said Lindsey in the

free exercise of "the right and privilege to make said homestead entry on lands of the United States as aforesaid, and to [mature] title in himself to said homestead; said rights and privileges being duly conferred by the Constitution and laws of the United States, and in particular by sections 2289, 2290, 2291 Revised Statutes," &c., and by "his individual act in compliance therewith."

2. Repeats the above, and adds that said defendants, in execution of their conspiracy, upon the same day, &c., *fired off loaded guns into the cabin of said Lindsey, and drove him from his home on said entry.*

3. Differs from the first count only by substituting for the charge of conspiracy, one of *going in disguise upon the same premises*, then occupied by Lindsey, for the purpose of hindering, &c., as before.

Sections 2289, 2290, and 2291 and 5508, cited in the record, are as follows:

> SECTION 2289. Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter-section or a less quantity of unappropriated public lands, upon which such person may have filed a pre-emption claim, or which may, at the time the application is made, be subject to pre-emption at one dollar and twenty-five cents per acre; or eighty acres or less of such unappropriated lands, at two dollars and fifty cents per acre, to be located in a body, in conformity to the legal subdivisions of the public lands, and after the same have

been surveyed. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

SECTION 2290. The person applying for the benefit of the preceding section shall, upon application to the register of the land office in which he is about to make such entry, make affidavit before the register or receiver that he is the head of a family, or he is twenty-one years or more of age, or has performed service in the Army or Navy of the United States, and that such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person; and upon filing such affidavit with the register or receiver, on payment of five dollars when the entry is of not more than eighty acres, and on payment of ten dollars when the entry is for more than eighty acres, he shall thereupon be permitted to enter the amount of land specified.

SECTION 2291. No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he,

she, or they will bear true allegiance to the Government of the United States; then, in such case, he, she, or they, if at the time citizens of the United States, shall be entitled to a patent, as in other cases provided by law. That the proof of residence, occupation, or cultivation, the affidavit of non-alienation, and the oath of allegiance, required to be made by section twenty-two hundred and ninety-one of the Revised Statutes, may be made before the judge or, in his absence, before the clerk, of any court of record of the county and State, or district and Territory, in which the lands are situated; and if said lands are situated in any unorganized county, such proof may be made in a similar manner in any adjacent county in said State or Territory; and the proof, affidavit, and oath, when so made and duly subscribed, shall have the same force and effect as if made before the register or receiver of the proper land district; and the same shall be transmitted by such judge, or the clerk of his court, to the register and the receiver, with the fee and charges allowed by law to him; and the register and receiver shall be entitled to the same fees for examining and approving said testimony as are now allowed by law for taking the same. That if any witness making such proof, or the said applicant making such affidavit or oath, swears falsely as to any material matter contained in said proof, affidavits, or oaths, the said false swearing being willful and corrupt, he shall be deemed guilty of perjury, and shall be liable to the same pains and penalties as if he had sworn falsely before the register.

SECTION 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so

exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

To take up the questions certified in their order:

1. Since the bringing up of this record the constitutionality of section 5508 has been considered and settled by this court. (Yarbrough's case, 110 U. S., 651.)

The indictment there charged a conspiracy to intimidate a citizen of African descent on account of his race, in, and because of, the exercise of the right of suffrage at an election for a member of Congress.

The court stated the general principle which governed that case as follows:

> "*The power arises out of the circumstances that the function in which the party is engaged, or the right which he is about to exercise, is dependent on the laws of the United States. In both of these cases it is the duty of that Government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing.*"

It is submitted without further argument that these words are deliberate, that the principle asserted therein is

clear, and that the present case is plainly within its verge; being one in which *residence*, &c., in order to mature the homestead right alleged, is itself a *subsidiary* right dependent on the laws of the United States, and one therefore which they are bound to protect.

In Yarbrough's case the allegation that the party injured was "of African descent" was superfluous; section 5508 selecting for the offenses upon which it operates a Federal quality other than that of a violation of the constitutionally ascertained *parity* of races, &c.

2 and 3. Inasmuch as the information appears to charge plainly and with precision a Federal offense committed by the defendants at a place within the jurisdiction of the circuit court for the eastern district of Arkansas,—in the absence of knowledge as to what particular *defect* in the proceeding was suggested by the defendants upon the oral argument below, I am unable to submit more than a suggestion that, in general, the second question should be answered affirmatively, and the third in the negative.

S. F. PHILLIPS,
Solicitor-General.

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112-76

IN THE

SUPREME COURT

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THE UNITED STATES
vs.
WADDELL ET ALS. } No. 513.

BRIEF FOR THE DEFENDANTS.

KELLOGG PRINT, LITTLE ROCK.

IN THE

SUPREME COURT

OF THE

UNITED STATES,

October Term, 1884.

THE UNITED STATES
vs.
WADDELL ET ALS. } No. 513.

BRIEF FOR THE DEFENDANTS.

The record in this case is short, and the "*brief*" of the learned Solicitor General relieves me of the necessity of any further statement of the issues raised. I desire however, at the outset to call attention to the fact that the constitutionality of *Sec.* 5508 is not by the demurrer of defendants called into question, further than in its application to the facts of this case, and the offense here charged.

The contention of the defendants is:

First—That the act from which *Sec.* 5508 is taken was never intended to apply to this class of cases.

Second—That there is no warrant in the Constitution of the United States either expressly or by reasonable implication, for the punishment, under a law of Congress, of the offense here charged.

As to the first proposition, the history of the legislation from which *Sec.* 5508 is taken, with all its surroundings, indicates clearly its application to a different class of offenses. It was unquestionably designed to afford a remedy for the protection of that class of "rights and privileges" of a semi-political character, which had been the outgrowth of the war, and guaranteed by the several amendments to the Constitution of the United States, then recently adopted.

It is a pregnant circumstance, that in all the history of Congressional legislation on the subject of public lands in the States, there is nowhere to be found a single intimation of any attempt to make the *actual fact* of interference with the homesteader's rights a criminal offense against the United States. Yet this court is asked, by a strained construction of a section intended for other purposes, to declare an act otherwise an offense only against the State, to be a crime against the United States, by reason merely of an *intention* to disturb the homesteader.

Noscitur a sociis, is a universal canon of construction, and nowhere applies with more force than in this case. The Act from which this is taken, and the chapter with which it is digested, are searched in vain for any even the most distant allusion to homestead or land laws, or violations thereof; while the whole Act and chapter, from beginning to close, teem with all manner of *suffrage laws*, enumerated with the utmost minuteness of detail.

Penal laws are always construed most liberally in favor of the citizen, and courts will not stretch their jurisdiction to grasp cases not contemplated by the legislative department of the government. This is elementary law.

The second question involves an inquiry into the character of the "*right*" here charged to have been invaded, and whether it is in fact derived from the State, or the United States.

The late case of *Yarbrough Ex Parte* 110, *U. S.* 651, settles the constitutionality of *Sec.* 5508 as applied to that class of cases, for which it was expressly provided. But there is nothing in that case to militate in the least against the contention of defendants in this. The right there involved was one dependent, as the court shows, upon the United States, and in the exercise of which the injured party was performing one of the most important functions of government.

In this case the *essential right* charged to be involved, that of "*residence*" and *quiet enjoyment*, is one not dependent upon or derived from the United States, but from *the State alone*. It is the duty of the *State alone* to protect against criminal violence all its citizens in the quiet enjoyment of their property, and that without regard to the source whence the *title comes*, whether from the United States or a private individual.

In the case of the homesteader under the United States, the government clothes him with the *title*, first inchoate, afterward made absolute. And the courts of the United States may well assume jurisdiction to settle all controversies as to such title and to determine the "dignity and effect of title emanating therefrom."

Gibson vs. Chouteau, 13 *Wall*, 102.

But to protect the donee from criminal violence directed against his possession and occupation of this land, is a duty devolved on the State, and nowhere else.

Of the right of *quiet enjoyment* of his property by every citizen, no matter where he gets title, may be said as was in *Cruikshanks' case*, 92 *U. S.*, 552, of the right of the people to assemble for lawful purposes.

"For their protection in its enjoyment the people must "look to the State. The power for that purpose was originally "placed there, and it has never been surrendered to the United "States.

"It (the general government) can neither grant or secure to "its citizens any right or privilege not expressly or by implica- "tion placed under its jurisdiction."

United States vs. Cruikshanks, 92 *U. S.*, 550.

In the City of New York vs. Miln 11 *Pet.* 139, the court says:

"We choose rather to place ourselves on what we consider "impregnable positions. They are these: That a State has "the same undeniable and unlimited jurisdiction over all persons "and things within its territorial limits as any foreign nation, "when that jurisdiction is not surrendered or restrained by the "Constitution of the United States. * * * That "all those powers which relate to merely *municipal legislation*, "or what may perhaps more properly be called *internal police*, "are not thus surrendered or restrained; and that, consequently, "as to them, the authority of a State is complete, unqualified "and *exclusive*."

United States vs. Reese, 92 *U. S.* 217.

"The duty of protecting all its citizens in the enjoyment of "an equality of rights was originally assumed by the States, "and it *remains there.*"

United States vs. Harris, 107 *U. S.*, 638.

92 *U. S.*, 542 *and* 555.

But perhaps the most comprehensive and satisfactory statement of the principle is to be found in the exhaustive opinion of Justice Miller in *Slaughter House Cases*, 16 *Wall*, 76 *et seqr.* He says speaking for the court: "What are the privileges and "immunities of citizens of the several States? * * What "those *fudamental* principles are, it would be more tedious than "difficult to enumerate. They may all however be compre- "hended under the following general heads: protection by the "Government, with the right to acquire and possess property of "every kind, and to pursue and obtain happiness and safety."

* * * * * * * * * *

"They are in the language of Judge Washington, those "rights which are fundamental. Throughout his opinion they "are spoken of as rights belonging to a citizen of the State. "They are so spoken of in the constitutional provision he was "construing. And they have always been held to be the class "of rights which the state governments were created to establish "and secure."

* * * * * * * * * *

"It would be the vainest show of learning to attempt to "prove by citations of authority, that up to the adoption of the "recent amendments, no claim or pretence was set up that these "rights depended on the Federal Government for their existence "or protection, beyond the very few express limitations which "the Federal Constitution imposed upon the States. Such for

"instance as the prohibition against *ex post facto* laws, bills of "attainder, and laws impairing the obligation of contracts."

"But with the exception of these and a few other restrictions, "the *entire domain* of the privileges and immunities of citizens "of the States as above defined, lay within the constitutional "and legislative power of the States, and *without that of the* "*Federal Government.*"

The authority of Congress over this subject is based upon the following sections of the Constitution of the United States:

Article IV. Section 3. * * The Congress shall have power to *dispose of*, and make all needful rules and regulations respecting the territory, or other *property* belonging to the United States; and nothing in this constitution shall be construed as to prejudice any claims of the United States or of *any particular State.*

Article I. Section 8.

"To make all laws which shall be necessary and proper for "carrying into execution the foregoing powers, and *all other* "powers vested by this constitution in the United States, or any "department or office, thereof."

These are the only provisions bearing on the subject.

The later amendments to the constitution, and which gave rise to the enactment of *Section* 5508, have not the remotest bearing on this case.

It has never before been claimed that these constitutional sections imposed any duties, or conferred any authority upon the general government, so far as concerns the relations and conduct of private citizens one toward another.

Commenting on this power this court in *Pollard's Lessee vs. Hagan*, 3 *How.*, 223-4, says: "The United States have no con-"stitutional capacity to exercise *municipal jurisdiction*, sov-"ereignty, or eminent domain within the limits of the State or "elsewhere, except in the cases in which it is expressly granted." * * * * "Full power is given to Congress, 'to make need-"ful rules and regulations respecting the territory or other "property of the United States.' This authorized the passage "of all laws necessary to secure the rights of the United States "in the public lands, and to provide for their sale, and to protect "them from taxation."

In *Gibson vs. Chouteau*, 13 *Wall*, 99, the court explains Article IV, Section 3, as follows:

"With respect to the public domain, the constitution vests "in Congress the power of disposition and making needful rules "and regulations. Congress has the absolute right to prescribe "the times, the mode, and the conditions of *transferring* this "property or any part of it."

The only authority vested in Congress by these sections was, to protect the property so long as it belonged to the United States, and to provide for *passing title* on sale or donation.

There is neither an express or implied authority here given to the United States, to so dispose of their lands as to interfere with the municipal authority of the State over this territory, in regulating the conduct of her citizens one toward another.

Story on the Constitution, Sections 1145, 1325.

The honored Circuit Judge in his opinion in this case, 16 *Fed. Reporter*, 222; says: "If the alleged outrage had been committed after his title was complete, *we should all agree* that

the crime was one arising under the laws of the *State alone.*" But he inclined to the opinion that while the title was inchoate the driving of Lindsey off the homestead, was and invasion of a right guaranteed to him by the United States.

It will hardly be contended that the general government of the United States stands pledged for all time to come to protect against private violence the donees or vendees of the public lands, merely because their *title* is derived from the United States, and Judge McCrary, was doubtless correct in the proposition just quoted.

The duty of the State, and the *State alone*, after absolute title passed, to afford this protection is clear and will not be controverted.

The "right" to such protection then, in the sense used in *Section* 5508, does not inhere in the *title*, and does not pass to the donee or purchaser on his becoming clothed with the fee absolute.

Now on what principle can it be said that the United States under this constitutional warrant to dispose of the public lands can exercise any enlarged power for the protection of the inchoate owner? How is the *inchoate title* clothed with a "right" incapable of assertion through the absolute title?

There is nothing in the relations of the general government either to the subject, or the party to justify such a distinction, and the view taken by the learned District Judge is the correct one.

As the owner of the land, the United States through its officers can protect its property from trespass or injury; but nothing of that kind is complained of here.

The mere permissive authority given the *inchoate owner* to "reside upon and cultivate" the land before patent, assuredly can not be said to be more potent in clothing him with the "right under the United States," than does the absolute ownership passing by the patent.

The right of residence and occupancy of the donee is in the one case under the general government, the right of absolute ownership including both the above, is in the other case from the same source.

The United States in each case clothes the donee with such title as he has, and its courts may well pass upon the dignity and weight of such title, and declare it superior to any other by which it is assailed, but this is a far different proposition from that which asserts the duty or the constitutional warrant of Congress to punish a violent outrage committed upon its donee or vendee merely because he is such donee.

An authority given to Congress to dispose of the public lands and make all needful rules and regulations therefor, can not be taken as a warrant for legislation to punish a mere criminal outrage by one private citizen upon another committed within the territorial limits of a State. And such was not the intent of the act under consideration.

Respectfully submitted,

JOSEPH W. MARTIN,

Attorney for Defendants.